

Case Summary

The State petitions for rehearing of our memorandum opinion for State v. Demucha, No. 79 A02-0610-CR-937 (Ind. Ct. App. Jan. 12, 2007). In that opinion, we held that the trial court's grant of Demucha's motion to suppress was not contrary to law. We based this decision upon a holding that the record did not support a conclusion that Sergeant Daniel McGrew ("Sergeant McGrew") and Officer Brian Phillips ("Phillips") had reasonable suspicion to stop Demucha, because the 9-1-1 recording cited to in the State's brief was not included in the record on appeal. In response to our decision, the State filed a motion to compel the transmittal of the 9-1-1 recording, which we granted. Our review of the 9-1-1 recording reveals that Sergeant McGrew and Officer Phillips did have reasonable suspicion to stop Demucha. As such, we grant rehearing and vacate our original opinion.

Facts and Procedural History

The relevant facts are as follows. On July 8, 2005, Carla Gibbs ("Gibbs"), a manager of a McDonald's in Lafayette, dialed 9-1-1 to report a possible intoxicated driver operating a small red passenger car. Gibbs provided her name, title, date of birth, and the address of the restaurant. She also offered to provide her social security number if needed. Gibbs described the vehicle as a little red car that was sitting in the McDonald's drive-through with a white female in the driver seat and a white male in the front passenger seat.

When asked by the dispatch officer to describe the indications of intoxication, an unidentified employee in the background said that "you can just tell" that both the driver and passenger of the car were drunk and noted that the individuals had dilated pupils, stuttered,

and the driver could not remember what she ordered. To delay the two people in the car until the police arrived, Gibbs instructed her employees to inform the driver, later identified as Demucha, that there was a holdup on their order and to remain at the pick-up window.

Based on the information provided by Gibbs, Sergeant McGrew and Officer Phillips were dispatched to the McDonald's in separate squad cars. When the officers arrived, Demucha and her passenger were still in the vehicle at the second drive-up window. Without engaging their squad cars' lights or sirens, Sergeant McGrew and Officer Phillips parked and exited their cars and approached Demucha's vehicle. Prior to observing any signs of intoxication and for the purpose of officer safety, Sergeant McGrew greeted Demucha and asked her to turn off the vehicle and hand him her keys.

On July 21, 2005, the State charged Demucha with Operating a Vehicle While Intoxicated as Class A misdemeanor,¹ Operating a Vehicle with a blood alcohol level of .15 or greater as a Class A misdemeanor,² and Minor in Possession of Alcoholic Beverages as a Class C misdemeanor.³ On April 6, 2006, Demucha filed a motion to suppress asserting that her detention by the police was in violation of her constitutional rights prohibiting unreasonable searches and seizures. After the hearing on May 1, 2006, the parties' attorneys were to schedule a time with the trial court to listen to the recording of the 9-1-1 call. The trial court issued its ruling on July 25, 2006, granting the motion to suppress, finding in part:

¹ Ind. Code § 9-30-5-2.

² I.C. § 9-30-5-1.

³ I.C. § 7.1-5-7-7.

[T]he initial phone call from the McDonald's employee failed to set forth a sufficient factual basis to raise reasonable suspicion that this Defendant was intoxicated. Thereafter, the arresting officer did not observe Defendant operate the subject motor vehicle. The arresting officer thereafter requested and was given possession of the keys to the motor vehicle, thereby detaining this Defendant without reasonable suspicion.

Appellant's Appendix at 19.

Discussion and Decision

Initially, we note that Demucha has not filed an appellee's brief. When an appellee does not submit a brief, an appellant may prevail by making a prima facie case of error. State v. Augustine, 851 N.E.2d 1022, 1025 (Ind. Ct. App. 2006). In this context, prima facie is defined as "at first sight, on first appearance, or on the face of it." Id.

The State has appealed from a negative judgment because the trial court effectively granted a motion to suppress evidence seized without a warrant. State v. Lefevers, 844 N.E.2d 508, 512 (Ind. Ct. App. 2006), trans. denied. The State, therefore, must show that the trial court's ruling on the suppression motion was contrary to law. Id. We will reverse a negative judgment only when the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that of the trial court. Id. We neither reweigh the evidence nor judge the credibility of witnesses and consider only the evidence most favorable to the judgment. Id. In the present case, the only evidence presented was the testimony of Sergeant McGrew and Officer Phillips and the 9-1-1 recording; thus, there was no competing evidence to weigh.

The State concedes that Demucha was detained but argues that the information provided by the McDonald's employee, acting as a concerned citizen informant, provided

law enforcement with the requisite reasonable suspicion. We agree. An investigatory stop, commonly known as a Terry stop, of a citizen by a police officer does not violate the Fourth Amendment rights of that individual where the officer, based on specific and articulable facts, has a reasonable suspicion of criminal activity. State v. Ritter, 801 N.E.2d 689, 691 (Ind. Ct. App. 2004), trans. denied. Such reasonable suspicion is determined on a case-by-case basis, in light of the totality of the circumstances. Id. Similarly, under Article 1, Section 11 of the Indiana Constitution, a police stop and brief detention of a motorist is reasonable if the officer reasonably suspects that the motorist is engaged in, or is about to engage in, illegal activity. Id. In judging the reasonableness of investigatory stops, courts must strike a balance between the public interest and the individual's right to personal security free from arbitrary interference by law enforcement officers. Bogetti v. State, 723 N.E.2d 876, 878 (Ind. Ct. App. 2000). The determination of reasonable suspicion is reviewed *de novo*. Id.

Thus, the question to be decided is whether Sergeant McGrew and Officer Phillips had a reasonable suspicion that Demucha had been driving under the influence of alcohol. Reasonable suspicion entails some minimal level of objective justification for making a stop, something more than an unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause. Wilson v. State, 670 N.E.2d 27, 29 (Ind. Ct. App. 1996) (citing U.S. v. Sokolow, 490 U.S. 1, 7 (1989)). Even if the stop is justified, a reasonable suspicion only allows the officer to temporarily freeze the situation for inquiry and does not give him all the rights attendant to an arrest. Burkett v. State, 736 N.E.2d 304,

306 (Ind. Ct. App. 2000).

The sole source for reasonable suspicion in this case comes from the information provided by Gibbs, because Sergeant McGrew testified that he did not observe any indications that Demucha was intoxicated prior to asking for her keys. Concerned citizen informants are individuals who have personally witnessed a crime and desire to assist law enforcement in solving the crime. Kellems v. State, 842 N.E.2d 352, 356 (Ind. 2006), reh'g granted on other grounds. The information provided by the concerned citizen informant contributes to the possible formation of reasonable suspicion. Id. Thus, to determine whether Sergeant McGrew and Officer Phillips had reasonable suspicion to conduct a so-called Terry stop, we first look to the information provided by the concerned citizen informant, Gibbs.

Gibbs identified herself, her title, the address of the McDonald's, and her date of birth, increasing the credibility of her information above that of an anonymous tip. She also provided information that at the restaurant's pick-up window there was a small red car occupied by a white male passenger and a white female driver. Gibbs told the police that two of her employees believed the two occupants to be drunk due to the dilation of their pupils, stuttering speech, and the driver's inability to recall what she ordered. These characteristics together are enough to reasonably question whether the driver was capable of safely operating her vehicle.

To confirm that the car matched the reported description, Officer Phillips drove past the red car prior to parking his car and approaching Demucha's vehicle. He concluded that

the color and size of the car, and the occupants of the car matched the description provided by Gibbs.

As noted by our Supreme Court in Kellems, another circumstance relevant to the reasonable suspicion analysis is the immediacy of the threat to public safety. Id. Although Demucha was not driving at the time the officers approached her car, it was clear that she drove to the pick-up window, and once she received her food, Demucha would most likely drive to her next destination. A legitimate public interest exists in deterring individuals from driving while intoxicated. Bogetti, 723 N.E.2d at 878.

In consideration of the totality of the circumstances of this case, we hold that Sergeant McGrew and Officer Phillips had a reasonable suspicion to conduct an investigatory stop.

Based on our conclusion, we reverse the grant of the motion to suppress and remand to the trial court for further proceedings.

Reversed and remanded.

VAIDIK, J., and BARNES, J., concur.